Supreme Court, U.S.
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88-2135

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1988

GLEN AVINGER,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the statute under which the Petitioner was sentenced violate the constitutional prohibition on cruel and unusual punishment and the constitutional guarantees of equal protection and due process?

2. Was evidence which was seized from the Petitioner's truck at the time of his arrest improperly admitted at trial because it was the result of a warrantless search without probable cause and therefore in violation of the fourth amendment?

3. Did prejudicial questions posed by counsel for the Petitioner's codefendant

on matters ruled inadmissible by the trial court deprive the Petitioner of his constitutional right to a fair trial?

4. Did the trial court's failure to grant the Petitioner's motion for severance of his trial from his codefendant's trial, despite the antagonistic defenses of the two defendants, deprive the Petitioner of his right to a fair trial?

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OPINIONS BELOW

The Petitioner's convictions in a trial by jury were affirmed by the Supreme Court of South Carolina in an unpublished opinion issued on May 1, 1989, which is set forth in the Appendix at A1.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). The order of the Supreme Court of South Carolina denying the Petitioner's appeal was issued on May 1, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The eighth amendment to the United States Constitution provides:

Excessive bail shall not be

> required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The fourteenth amendment provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law[.]

S.C. Code Ann. § 44-53-370(e)(2) states:

> (e) Any person who knowingly sells, manufactures, delivers, or brings into this State, or who provides financial assistance or otherwise aids, abets, or conspires to sell, manufacture, deliver, or bring into this State, or who is knowingly in actual or constructive possession of:
>
> . . . .
>
> (2) Ten grams or more of cocaine or any mixtures containing cocaine, as provided in § 44-53-210(b)(4) is guilty of a felony which is known as 'trafficking in cocaine' and upon conviction must be punished as follows if the quan-

tity involved is:

(a) Ten grams or more, but less than twenty-eight grams, a term of imprisonment of not less than three years nor more than ten years and a fine of ten thousand dollars.

(b) Twenty-eight grams or more, but less than one hundred grams, a term of imprisonment of not less than seven years nor more than twenty-five years and a fine of fifty thousand dollars.

(c) One hundred grams or more, but less than two hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended, and a fine of fifty thousand dollars.

(d) Two hundred grams or more, but less than four hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended, and a fine of one hundred thousand dollars.

(e) Four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a mandatory minimum term of imprisonment of twenty-five

years, no part of which may be suspended, and a fine of two hundred thousand dollars.

STATEMENT OF THE CASE

On July 6, 1987, a grand jury in Charleston County returned an indictment charging the Petitioner, Glen M. Avinger, with delivery and conspiracy to deliver 140 grams of cocaine in violation of S.C. Code Ann. § 44-53-370 (Law. Co-op. 1985), and unlawful possession of a firearm in violation of S.C.C.A. § 16-23-20. Trial was held before a jury on September 14, 1987, at which Avinger was found guilty on both counts and sentenced to a mandatory 25 years in prison and a $50,000 fine on the drug trafficking charges and to a concurrent one-year prison term on the weapons charge. Motions for a di-

rected verdict, a new trial, and judgment notwithstanding the verdict were made by Avinger, but were denied.

Prior to trial, Avinger moved to quash the cocaine trafficking charges on the grounds that S.C.C.A. § 44-53-370(e)-(2)(c) is unconstitutionally vague and overbroad, and that the mandatory minimum 25-year sentence and $50,000 fine constitute cruel and unusual punishment (see Transcript of Record at 2; 323). This motion was denied (T.R. at 8-10; A5).

Avinger also moved prior to trial for a severance of his trial from codefendant Jerome Vann's trial (T.R. at 11; 330). This motion was based on the fact that Avinger expected to present a defense denying any involvement with the crime while Vann was prepared to admit

involvement in the crime but contend he had only a minor role. The motion asserted that the defenses were antagonistic and prejudicial to Avinger, and that the case against Avinger was almost entirely circumstantial and a joint trial would make it impossible for the jury to separate the direct evidence against Vann from the circumstantial case against Avinger. The court denied the motion to sever (T.R. at 20-21; A8).

A pretrial motion was also made to suppress evidence seized without a warrant from Avinger's truck shortly after he was arrested (T.R. at 333). At trial, Sergeant Eldredge Ellett of the North Charleston Police Department testified that he conducted the search of Avinger's truck at the behest of Sergeant Hayward

Crosby Jr., of the Charleston County Police Department. Ellett stated that he entered the truck and saw a blue canvas zipper bag on the passenger side floorboard. The zipper was open and upon looking inside the bag, Ellett discovered a set of triple beam scales and a pistol. The court ruled that the police had probable cause to believe that contraband was contained in the truck, so the warrantless search was not illegal (T.R. at 219-220; A12). The set of scales and the pistol were thereafter admitted into evidence.

At trial, the state presented the testimony of Detective Barbara Thibodeaux of the Charleston County Police Department. She stated that on March 4, 1987, she was informed that a five-ounce co-

caine purchase had been set up by a confidential informant to take place at a residence on Johns Island near Charleston. An undercover officer was chosen to make the purchase with the informant and surveillance of the two was set up by Thibodeaux. The undercover officer, Officer Cumbee, was wired with a transmitter in order to monitor the events. Once the residence on Johns Island was identified by the police, Thibodeaux and the others maintained surveillance of it and observed Cumbee and the informant arrive at the residence.

During the surveillance, Thibodeaux testified that she recognized one of the three cars parked at the residence to be a Mercedes owned by Jerome Vann; she also stated that her information was that the

people at the Johns Island residence were going to have the cocaine there. After Cumbee and the informant entered the residence, Thibodeaux heard an unidentified male indicate that the cocaine was not there and ask for $10,000 so he could go get it in Mount Pleasant. Cumbee refused to let go of the money until he saw the cocaine. Thibodeaux then overheard some phone calls being made, and heard the people agree to meet back at the residence to decide where and when the purchase would be made. Thibodeaux then observed Cumbee and the informant leave, and then saw Vann leave.

The police then met Cumbee and the informant at a restaurant. The informant called the Johns Island residence to try to make arrangements to buy the cocaine

at Citadel Mall. The officers then went to Citadel Mall, where the informant again called the Johns Island residence and spoke to a Mr. Beasley, who lived there and was present at the earlier meeting. Beasley indicated that they wanted to meet at the parking lot of RB's in Mount Pleasant. In order to protect Cumbee's cover that he was from Columbia, he and the informant went elsewhere to meet Beasley and have Beasley lead them to RB's. Thibodeaux and another officer followed Cumbee and the informant, while the rest of the surveillance team went to RB's. After following Cumbee to RB's, Thibodeaux went to Vann's residence, and after seeing his car was not there, they returned to RB's and took up surveillance.

Thereafter, Vann arrived and the informant got in Vann's car. The two circled RB's parking lot and came back next to where Cumbee was parked. Thibodeaux parked her surveillance vehicle across from Cumbee's vehicle and observed and listened to what transpired. The officers heard Vann state that "his man" wanted to do the deal at a motel where scales could be used to weigh the cocaine. Cumbee refused to change the meeting to another place and told Vann he wanted to deal right there, at which point Vann then told Cumbee he was going to call "his man" back, and got back into his own vehicle, which had a car phone. Vann then told the informant and Cumbee that he was going to meet his source at a nearby Pizza Hut once he got a signal on

his beeper. A few minutes later Thibodeaux heard a beeper go off and saw Vann leave in his vehicle. Other surveillance officers told Thibodeaux that Vann had left RB's parking lot and went to Pizza Hut. Later, Vann returned to RB's parking lot and got into Cumbee's vehicle. A few seconds later, Thibodeaux heard the signal indicating that the transaction had been made. At this point, Thibodeaux and the other police officers moved in and began making arrests. Thibodeaux first came upon Beasley and placed him under arrest. Thibodeaux next entered RB's and saw a man that proved to be the Petitioner, Glen Avinger. Avinger was entering a telephone booth, and at that point Detective Frazier and a Mount Pleasant police officer placed Avinger under

arrest. Thibodeaux testified that Avinger was arrested based on the fact that he drove into RB's parking lot soon after Vann returned from Pizza Hut, and was driving a small pickup truck matching the description given by police surveying the Pizza Hut. Thibodeaux testified that after the arrests, officers were assigned to take charge of the arrestees' vehicles.

On cross-examination, Thibodeaux stated that, prior to entering RB's, she had not seen Avinger, nor had the name Glen Avinger been mentioned during the conversations she monitored from Cumbee's transmitter. Thibodeaux also stated she did not see what transpired at the Pizza Hut, nor did any officer see what Avinger did once he entered RB's.

Sergeant Hayward Crosby Jr. of the Charleston County Police Department was also on the surveillance team. He testified that, when he learned Vann was going to meet someone at Pizza Hut, he went there by car to observe. Once there, Crosby did not see Vann meet anyone, but heard he had met someone, and saw Vann's Mercedes parked in the Pizza Hut parking lot with no one inside it. Crosby stated that he then followed a gray Ford pickup truck, later determined to be Avinger's, as it left Pizza Hut. Crosby followed the pickup for a short period, but did not see who was inside it. He then saw it come back to the Pizza Hut parking lot, but then discontinued his surveillance for fear of being spotted. The next time Crosby saw the

gray pickup was when it was going down a road into RB's parking lot. Crosby then drove to RB's, saw the pickup parked there, and got out of his vehicle to check the area. Crosby testified he did not make any of the arrests.

During trial, counsel for codefendant Vann asked Thibodeaux whether the police had searched Avinger's house after his arrest. An immediate objection was entered by defense counsel, which was sustained. In subsequent discussion, the state's attorney stated that the state agreed that any reference to a search at Avinger's house was improper because there had been no probable cause to conduct a search, and the court agreed. Defense counsel moved for a mistrial based on this question, which the court

denied. Later, during codefendant's counsel's examination of Officer Cumbee, he again asked about the search at Avinger's house, which was again objected to and sustained.

Following the conviction of Avinger, an appeal was taken to the Supreme Court of South Carolina on the basis of exceptions pertaining to the issues presented in this petition (T.R. at 337; A14), but the appeal was denied in a summary per curiam opinion (A-1).

ARGUMENT

I. **THE STATUTE UNDER WHICH THE PETITIONER WAS CONVICTED AND SENTENCED VIOLATES EQUAL PROTECTION, DUE PROCESS, AND THE CONSTITUTIONAL GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT.**

The Petitioner, Glen Avinger, was indicted, convicted and sentenced for violating S.C. Code Ann. § 44-53-370(e)(2)(c) (Law. Co-op. 1985), which provides that any person who knowingly delivers, or otherwise aids, abets or conspires to deliver:

> (2) Ten grams or more of cocaine or any mixtures containing cocaine . . . is guilty of a felony which is known as "trafficking in cocaine" and upon conviction must be punished as follows if the quantity involved is:
>
> . . . .

> (c) One hundred grams or more, but less than two hundred grams, a mandatory term of imprisonment of twenty-five years, no part of which may be suspended, and a fine of fifty thousand dollars.

Prior to trial, Avinger moved to dismiss the charge under S.C.C.A. § 44-53-370(e)(2)(c), contending that the statute's mandatory minimum sentence, which was ultimately imposed, is unconstitutional as violative of equal protection, due process, and the prohibition on cruel and unusual punishment. This motion was denied by both the trial court and the South Carolina Supreme Court, and Avinger again urges in this petition that his conviction be overturned based on the unconstitutionality of S.C.C.A. § 44-53-370(e)(2)(c).

The eighth and fourteenth amendments to the United States Constitution prohibit states from imposing "cruel and unusual punishment." In Solem v. Helm, 463 U.S. 277, 284 (1983), this Court established the standards for determining whether a particular sentencing scheme violates the constitutional bar on cruel and unusual punishment, noting that the Constitution "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." Solem held that a reviewing court must look to three factors in determining whether a sentence is disproportionate to the crime: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and

(3) sentences for the same crime in other jurisdictions. Id. at 290-92. It also held that the "principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common law jurisprudence." Id. at 284.

As noted above, Avinger was given the mandatory minimum sentence of 25 years in prison under S.C.C.A. § 44-53-370(e)(2)(c), and there is no opportunity for parole. Applying the factors identified in Solem v. Helm, supra, to the instant sentencing scheme, there is little doubt that the sentence is disproportionate and violates the prohibition on cruel and unusual punishment.

As to the first factor, Solem established several criteria for weighing

the relative seriousness of an offense. The Supreme Court stated that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." Solem v. Helm, supra, 463 U.S. at 292-93. Furthermore, the general culpability of an offender should be considered in assuring that the punishment fits the crime. Id. at 293. With regard to the first criterion, it is clear that cocaine possession or trafficking is not a violent crime and so does not lie toward the upper end of the spectrum of serious crime. Furthermore, there is simply no leeway granted by the statute for accounting for the culpability of a particular defendant. An offender, such as Avinger in this case, is required to receive a 25-year man-

datory minimum sentence regardless of the circumstances as to how he came into possession of the drugs or the reason he was in possession. A defendant may have been a prime architect of a drug conspiracy, or he may merely have been temporarily holding drugs for another. Yet despite such a wide disparity between the nature of the violation, the statute allows for no consideration of the culpability of the defendant in sentencing.

The second factor the court must look at is the sentence imposed on other criminals in the same jurisdiction. In South Carolina, the drug trafficking statute imposes virtually the most severe penalty in the criminal code, excluding capital felonies and life felonies. S.C.C.A. § 16-3-20 provides a life sen-

tence for murder. However, the offender is eligible for parole in 20 years--five less than the mandatory minimum for trafficking in marijuana. The minimum penalty for manslaughter is two years. S.C.C.A. § 16-3-50. Arson of a building is punishable by a term in prison of five to 25 years, § 16-11-110(A); arson of a dwelling house by a two-to-20-year sentence, § 16-11-110(B); and arson of any other structure by a one-to-10-year sentence, § 16-11-110(C). Breaking and entering is punishable by a sentence not exceeding 10 years. § 16-11-320. Armed robbery is punishable by a term in a prison of 10-25 years, § 16-11-330(1), but the mandatory minimum sentence is only seven years. Id. Tampering with drug or food products is punishable by a

minimum sentence of 10 years. § 16-3-75. There is no mandatory minimum sentence for assault and battery with intent to kill, § 16-3-320; the maximum penalty is 20 years. Id. Criminal sexual conduct in the first degree has no mandatory minimum penalty and the maximum penalty is 30 years. § 16-3-652. The crime of engaging a child for sexual performance has no mandatory minimum penalty and a maximum penalty of 20 years. § 16-3-810.

As can be seen, the punishment for trafficking in cocaine is substantially more severe than all of the above crimes, except murder. Even a convicted murderer has a chance for parole in 20 years, a chance not available to someone, like the Petitioner in this case, who is convicted of cocaine trafficking. The fact that

South Carolina punishes life-threatening and life-taking crimes of brutality and violence less severely than the crime of possession of more than 100 grams of cocaine should be sufficient to shock the conscience of this Court and to question the constitutional validity of S.C.C.A. § 44-53-370. As was held in In re Grant, 18 Cal. 3d 1, 553 P.2d 590, 595 (1976), if among the punishments set out by a state's statutes there are found more serious crimes punished less severely than the offense in question, the challenged statute is constitutionally suspect. The principle of proportionality stated in Solem v. Helm, supra, requiring that nonviolent crimes be punished less severely than violent crimes, is clearly violated by the mandatory minimum 25-

year sentence meted out here under S.C.C.A. § 44-53-370(e)(2)(c).

The third factor of Solem also makes plain the disproportionate nature of the sentence imposed here. None of the several neighboring states punish possession of a similar amount of cocaine as severely as South Carolina. For example, Florida sets a mandatory minimum sentence of three years imprisonment and a $50,000 fine for possession of 100 grams of cocaine, and imposes only a five-year sentence for possession of up to 400 grams. Fla. Stat. Ann. § 893.135(b)(1)(2) (West Supp. 1988). Georgia imposes a sentence of imprisonment of from two to 15 years for possession of cocaine. Ga. Code Ann. § 16-13-30 (Supp. 1987). North Carolina imposes a mandatory minimum sentence of

only seven years for possession of 100 grams of cocaine with intent to distribute. N.C. Gen. Stat. § 90-95(h)(3)(9) (1987).

An examination of the penalties imposed by other jurisdictions for possession or distribution of cocaine in similar amounts further shows the extreme severity of S.C.C.A. § 44-53-370(e)(2)(c). See 21 U.S.C.A. § 841(b)(1)(c) (West Supp. 1988) (up to 20 years' imprisonment and up to $1 million fine); Ala. Code Ann. § 20-2-80(2)(a) (Supp. 1987) (mandatory minimum of three years' imprisonment and up to $50,000 fine); Cal. Health & Safety Code § 11351 (West Supp. 1988) (two to four years' imprisonment); Ill. Rev. Stat. ch. 56 1/2, ¶ 1401 (1985) (between six and 30 years' impri-

sonment and up to a $500,000 fine); Md. Ann. Code art. 27, § 286(b)(1) (1987) (up to 20 years' imprisonment and up to $25,000 fine); N.Y. Penal Law § 70.00(3)(a)(i) (McKinney 1987) (maximum of life imprisonment, minimum of 15 to 25 years' imprisonment); Ohio Rev. Code Ann. § 2925.03(c)(6) (Page 1987) (mandatory five years' imprisonment); 35 Pa. C.S. § 780-113(f)(1) (Purdon Supp. 1987) (up to 15 years' imprisonment and up to $100,000 fine); Tex. Rev. Civ. Stat. Ann. art. 4476-15, § 4.03 (Vernon 1976) (from five years' to life imprisonment); Va. Code Ann. § 18.2-248 (Supp. 1987) (from five to 40 years' imprisonment and up to $100,000 fine); W. Va. Code Ann. § 60A-4-401(a)(i) (1984) (from one to 15 years' imprisonment and a fine up to $25,000).

Of these jurisdictions, only New York, Texas, Illinois and Virginia allow penalties greater than those imposed by South Carolina. Yet each of these other states also allows for a sentence substantially less than the minimum mandatory 25-year-sentence required under S.C.C.A. § 44-53-370(e)(2)(c). Thus, South Carolina's inflexible sentencing for cocaine possession or trafficking is undoubtedly more severe than that of any other state.

Thus, from the analysis mandated in Solem v. Helm, supra, it is clear that South Carolina's 25-year mandatory minimum sentence for trafficking in cocaine is (1) disproportionately severe compared to the gravity of the offense; (2) more severe than sentences imposed on other

criminals in South Carolina for more serious crimes; and (3) more severe than the sentences imposed for commission for the same crime in other jurisdictions. Accordingly, under Solem v. Helm, supra, S.C.C.A. § 44-53-370(e)(1)(b) violates the cruel and unusual punishment clause of the eighth amendment of the Constitution, as well as art. 1, § 15 of the South Carolina Constitution. See Stockton v. Leeke, 269 S.C. 459, 237 S.E.2d 896 (1977).

Other courts have not hesitated in striking down sentences and statutes imposing penalties even less severe than those involved here. Thus, in People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827, 834 (1972), the court found a sentence to be cruel and unusual, stating that "a

compulsory prison sentence of 20 years for a nonviolent crime imposed without consideration for defendant's individual personality and history is so excessive that it 'shocks the conscience.'" The same can be said to be true of the mandatory 25-year sentence imposed on the Petitioner here. Similarly, in Downey v. Perni, 518 F.2d 1288, 1292 (6th Cir.), vacated on other grounds, 423 U.S. 933 (1975), the court found minimum terms of 10 years' imprisonment for possession of marijuana and 20 years for sale of marijuana to be "excessive in length and disproportionate to the nature of the offense for which [the defendant] was convicted." And, in In re Foss, 10 Cal. 3d 910, 519 P.2d 1073 (1974), the court invalidated as cruel and unusual a 10-

year sentence, without the possibility of parole, imposed on a repeat offender for five counts of furnishing heroin. See also In re Grant, supra (10-year mandatory minimum sentence for sale of marijuana imposed on a repeat offender held to be cruel and unusual); State v. Bing, 410 So. 2d 227 (La. 1982) (sentence of four years at hard labor for possession with intent to sell 28 pounds of marijuana struck down as excessive).

The sentence imposed on Avinger in this case is even more severe than those struck down as cruel and unusual in the cases above. This fact, along with the fact that a nonviolent crime is involved and that the penalty is much harsher than the punishment provided for cocaine trafficking in other jurisdictions, requires

the conclusion that S.C.C.A. § 44-57-370(e)(2)(c) violates the prohibition on cruel and unusual punishment.

Moreover, the distinctions in sentences made by S.C.C.A. § 44-57-370(e)(2) are so arbitrary and irrational that their application offends the guarantees of equal protection and due process contained in the United States and South Carolina Constitutions. U.S. Const. amend. 14; S.C. Const. art. I, § 3. In setting up a penalty scheme, the legislature must not act arbitrarily and there should be a rational basis for the distinctions it makes in assessing penalties in order to comply with due process and equal protection. Sumner v. Shuman, 107 S. Ct. 2716 (1987); National Organization for Reform of Marijuana Laws (NORML) v.

Bell, 488 F. Supp. 123, 138 (D.D.C. 1980).

Examining the penalties for cocaine trafficking set out in S.C.C.A. § 44-53-370(e)(2), it is plain that the sentencing scheme it sets up is not rational. Under § 44-53-370(e)(2)(a), a person found guilty of possessing from 10 to 28 grams of cocaine may be sentenced to between three and 10 years in prison. For possession of more than 28 but less than 100 grams, a sentence of between seven and 25 years may be imposed. § 44-53-370(e)(2)(b). A person convicted of possessing between 100 and 200 grams of cocaine, such as Avinger, receives the mandatory minimum sentence of 25 years. § 44-53-370(e)(2)(c). However, a conviction for possessing any amount over 200

grams also receives the minimum mandatory 25-year sentence under § 44-53-370(e)(2)(d) and (e). Thus, the same 25-year sentence is given whether the person possessed 100 grams or 100 pounds of cocaine, with only the fine changing.

This sentencing scheme is clearly arbitrary and irrational since it requires that large-scale traffickers who possess and distribute vast amounts of cocaine receive the same sentence as those convicted of possessing 100 grams. While the scheme purports to be graded based on the amount of cocaine possessed, the statute makes no distinction for imprisonment purposes when the amount is over 100 grams. Thus, a person possessing the minimum 100 grams receives the same prison sentence as someone convicted

of trafficking 100 pounds or 1,000 pounds. Such a scheme lacks any rational basis, and must be held to offend the guarantees of due process and equal protection. The trial court's failure to quash the indictment based on the unconstitutionality of S.C.C.A. § 44-53-370(e)(2) was thus error, and South Carolina Supreme Court erred in failing to reverse that decision.

II. THE TRIAL COURT ERRED IN NOT GRANTING THE PETITIONER'S MOTION TO SUPPRESS BECAUSE THERE WAS NO PROBABLE CAUSE TO SEARCH THE PETITIONER'S VEHICLE.

The trial court's decision to deny Avinger's motion to suppress the evidence seized from his pickup truck after his arrest (and the implicit approval of this

decision by the South Carolina Supreme Court) was based on the court's view that the search was within the automobile exception. The trial court's statement of the law during consideration of this motion was partially correct; police may search a vehicle and any containers found therein without a warrant when they have probable cause to believe the vehicle contains contraband. United States v. Ross, 456 U.S. 798 (1982). However, it is clear that the trial court's conclusion that probable cause existed to search the defendant's vehicle was not supported by the evidence below and was erroneous. Because the search was warrantless, the state had the burden of proof of showing that there was probable cause to search the vehicle, thus allow-

ing application of the automobile exception. United States v. Jeffers, 342 U.S. 48, 51 (1951). The state failed to meet its burden.

It is beyond any doubt that Sergeant Ellett, who conducted the search of Avinger's truck, did not personally have probable cause. Ellett specifically testified that he searched the truck at the behest of another police officer, whom he "believed" was Sergeant Crosby. Although Ellett himself had no probable cause to search the truck, the search would have been lawful if the officer who directed him to conduct the search had probable cause. Whiteley v. Warden, 401 U.S. 560, 568 (1971); United States v. Laughman, 618 F.2d 1067, 1072 (4th Cir.), cert. denied, 447 U.S. 925 (1980). How-

ever, there is no indication in Crosby's testimony that he instructed Ellett to search Avinger's vehicle. In light of the absence of any testimony from Crosby that he told Ellett to search the vehicle and Ellett's equivocal testimony that he merely "believed" Crosby told him to search the truck, the knowledge of Crosby cannot be imputed to Ellett for the purpose of providing probable cause to conduct the search. This is especially true in light of the fact that it was the prosecution that had the burden of proving the facts justifying the warrantless search. United States v. Jeffers, supra.

Because Crosby did not testify that he ordered the search, the only other person that the order to search could have come from is Detective Thibodeaux,

who did testify that officers were assigned to take charge of the arrestees' vehicles. Again, Ellett's warrantless search would have been legal only if Thibodeaux had personal knowledge of facts constituting probable cause. United States v. Laughman, supra, 618 F.2d at 1072-73.

An examination of the facts testified to by Thibodeaux clearly shows that she did not have probable cause to believe contraband was in Avinger's truck. Thibodeaux was informed of the drug deal and assigned to monitor and oversee the undercover buy, but during that time she received no information linking drugs with Avinger's vehicle. The sum of her knowledge was that Officer Cumbee had met Vann and discussed the

purchase of cocaine, both at John's Island and at RB's, and that Vann had indicated he was to get the cocaine from "his man." Thibodeaux's only testimony concerning Avinger was that she saw him enter RB's soon after Vann returned there and that he was driving a pickup truck matching a description given to her by other surveillance units at Pizza Hut. When she received the signal from Cumbee that the deal had been made, Thibodeaux entered the restaurant and arrested Avinger, and the vehicle search ensued.

The trial court's conclusion based on this evidence that the police had probable cause to believe drugs would be found in Avinger's car cannot stand. In order for the automobile exception to apply, the officer's probable cause de-

termination must be based on objective facts that could justify the issuance of a warrant indicating that contraband is presently located in a vehicle. United States v. Ross, supra, 456 U.S. at 808. Nothing in Thibodeaux's testimony indicates that she had some objective basis for determining that contraband was probably located in Avinger's truck except for her testimony that Avinger drove the truck to RB's soon after Vann arrived and that the truck matched a description given by surveillance units at Pizza Hut. At no point did Thibodeaux testify that she was told by the other surveillance unit that Vann was seen entering Avinger's truck or any other connection between Avinger and Vann. Such testimony is simply insufficient to show that

Thibodeaux had probable cause, especially since the state had the burden of justifying the warrantless search.

Moreover, even if it could be assumed that Thibodeaux was told that Vann had entered Avinger's truck over at the Pizza Hut, this extra fact would not have given her probable cause. A warrantless search cannot be upheld unless the facts known by police gave them probable cause to believe the vehicle currently contained contraband. See Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978) (critical element for probable cause is not whether owner of property is suspected of a crime, but whether thing to be seized is located in the area to be searched). This probable cause does not exist simply due to a person's associa-

tion with a drug dealer. "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." Ybarra v. Illinois, 444 U.S. 85, 91 (1979). Even assuming Thibodeaux knew that Vann previously had entered Avinger's truck and sometime later connected Vann with a cocaine sale, this single meeting and association was not sufficient to support the warrantless search of Avinger's truck. See Sawyer v. State, 456 So. 2d 114, 116 (Ala. Crim. App. 1984) (police did not have probable cause to search the defendant's car after she was seen leaving room of a man known to be a drug dealer; such circumstance only raised a suspicion of criminal activity which is

not enough to justify a warrantless search).

Moreover, any connection that Thibodeaux may have made between Avinger and drug dealing would not have justified the further conclusion that drugs were currently in the truck when the search was ordered. Again, there must be probable cause to believe that evidence or contraband is in the place to be searched at the time the search is conducted. Zurcher v. Stanford Daily, supra, 436 U.S. at 556. In the instant case, neither Thibodeaux nor any other officer had any real basis for believing that drugs could be found in Avinger's truck. Even if Thibodeaux's testimony can be construed as indicating that she knew Vann had met Avinger at Pizza Hut, this mere associa-

tion with one known to have possessed drugs does not allow an inference that Avinger's car contained drugs at a later time. Ybarra v. Illinois, supra. Furthermore, even if the police could infer that Avinger had given Vann the drugs at Pizza Hut, there was no basis for their conclusion that Avinger's truck contained contraband later on at RB's, especially since Officer Cumbee had already received all the drugs that were going to be sold. Absent some concrete basis for connecting Avinger's truck with a current presence of drugs, there was no probable cause to search the truck and the trial court's ruling that the automobile exception applied to this warrantless search was clearly erroneous.

Confronted with similar facts, the

court in State v. Friday, 140 Wis. 2d 701, 412 N.W.2d 540, 543 (Ct. App. 1987), held that police officers had no probable cause to search the defendant's car after they had observed the defendant engaging in drug dealing behavior in a restaurant. The court reasoned that even if the police had facts raising the probability that the defendant was dealing drugs in the restaurant, "they establish at most that controlled substances may have been in the restaurant, not in Friday's car. We are unwilling to 'infer' any suspected drugs from the restaurant into the car." 412 N.W.2d at 540. Similarly, in State v. Hewitt, 495 So. 2d 809, 815 (Fla. DCA 1986), the court upheld the suppression of evidence seized during a warrantless search of the defendant's car where the

state failed to show that the officer conducting the search had sufficient cause to believe the car contained contraband. The officer had been told by an informant that the defendant was dealing in drugs and saw the defendant act suspiciously while driving his car, but because he had no further information placing contraband in the defendant's car, the officer had no probable cause to search it. See also State v. Mackey, 56 N.C. App. 468, 291 S.E.2d 663, 666 (1982) (fact that defendant's van was seen parked at a house in which drugs were found did not give police probable cause to stop and search the van for contraband).

These cases demonstrate that in order for police to have probable cause

to search a vehicle, they must have some objective basis for believing that contraband was presently located in the vehicle. There were no objective facts within Thibodeaux's knowledge in this case, and the ruling that the search was lawful, upheld by the South Carolina Supreme Court, was erroneous and contrary to decisions of other state courts.

The erroneous admission of the gun and scales seized from the truck cannot be considered harmless error. This constitutional error can only be considered harmless if it appears beyond a reasonable doubt that it did not affect the outcome of the trial. Chapman v. State of California, 386 U.S. 18, 24 (1967). With respect to the gun illegally seized from Avinger's truck, its admission into

evidence was obviously harmful since it was the very basis for the illegal possession of a weapon charge. Admitting the scales that were seized from the truck must also be considered harmful, since it was the sole physical evidence connecting Avinger with the cocaine trafficking charge. All the rest of the evidence against Avinger consisted of innuendos and inferences arising from his presence at certain places and the highly questionable testimony of Vann, who attempted to shift the blame to Avinger. Without the scales, the state's case was premised almost entirely on inferences to be drawn against Avinger, so it cannot be said that the erroneous admission of the scales could not have affected the outcome of the trial.

III. THE PETITIONER WAS DENIED A FAIR TRIAL BY CODEFENDANT COUNSEL'S REPEATED REFERENCES TO INADMISSIBLE AND PREJUDICIAL FACTS.

During trial, counsel for codefendant Vann asked both Thibodeaux and Cumbee questions concerning the search at Avinger's house. This subject was admitted to be improper and ruled so by the court, since there had been no probable cause for any search at Avinger's home. Despite this ruling by the court, codefendant's counsel went on to question Cumbee about the search. It is clear that the codefendant was seeking only to prejudice Avinger, since Vann's defense was that he was only a "mule" in the operation and tried to buttress this defense by shifting as much blame as

possible to Avinger.

The cases make it clear that it is entirely improper for a prosecuting attorney to raise irrelevant issues during the examination of witnesses for the sole purpose of prejudicing the defendant. Taylor v. Kentucky, 436 U.S. 478 (1978); State v. Woomer, 277 S.C. 170, 284 S.E.2d 357, 358 (1981); State v. Swilling, 246 S.C. 144, 142 S.E.2d 864, 867-68 (1968). Where the introduction of immaterial and prejudicial matter infects the fundamental fairness of a trial, a court should exercise its supervisory rights to grant a defendant a new trial. Malley v. Manson, 547 F.2d 25, 28 (1976), cert. denied, 430 U.S. 918 (1977); State v. King, 222 S.C. 108, 71 S.E.2d 793, 797 (1952).

Because this rule is to ensure that

a defendant receives a fair trial, it should also be applied where, as in the instant case, the prejudicial questions are asked by a codefendant's counsel. Whether the irrelevant questions come from the prosecutor or a codefendant's counsel does not lessen the prejudicial impact, and a court must intercede in either event to assure that the defendant's trial is fair.

In the instant case, the questioning by the codefendant's counsel about the search was obviously for the sole purpose of prejudicing Avinger. Throughout the trial, Vann's counsel sought to shift the blame from Vann to Avinger and by asking questions about a search at Avinger's house, he plainly tried to raise a belief in the minds of the jurors that more

drugs were found there. This was done even after the court had ruled such questions objectionable. It is clear that these prejudicial questions deprived Avinger of his right to a fair trial, and this Court must assure this right by reversing Avinger's conviction and granting him a new trial.

IV. THE PETITIONER WAS DENIED A FAIR TRIAL WHEN HIS MOTION FOR SEVERANCE OF HIS TRIAL FROM CODEFENDANT'S WAS DENIED BECAUSE THEIR DEFENSES WERE ANTAGONISTIC.

From the very inception of this trial, it was clear that the two codefendants would pursue opposite strategies in making their defenses. While Avinger asserted that he was uninvolved in any cocaine trafficking, codefendant Vann saw

fit to admit that he had delivered the cocaine to the police, but asserted that he was merely a "mule" in a cocaine operation run by Avinger. There cannot be imagined any more diametrically opposed defenses as were involved here, yet the trial court rejected Avinger's pretrial and trial motions to sever his case and give him a separate trial.

The trial court can grant a defendant's motion for severance when it is shown that his defense is antagonistic to his codefendant's. State v. Allen, 266 S.C. 175, 222 S.E.2d 287, 290 (1976). Indeed, it has been held that severance is mandated if a substantial degree of prejudice would spring from a joint trial and deprive the defendant of his due process right to a fair trial. United

States v. Lane, 474 U.S. 438 (1986); United States v. Shuford, 454 F.2d 772, 776 (4th Cir. 1971). "If it clearly appears however that a defendant will not receive a fair trial without a severance when all the circumstances are considered in the light of sound judicial discretion and common sense, then the severance must be granted." Baker v. United States, 329 F.2d 786, 787 (10th Cir.), cert. denied, 379 U.S. 853 (1964).

Examining the circumstances here, it is obvious that the antagonistic defenses of the codefendants not only posed a threat of severe prejudice but did in fact cause prejudice to Avinger. This antagonism was especially critical to Avinger's case, since he denied guilt while Vann admitted involvement. Thus,

the sole tactic of Vann was to shift blame to Avinger and try to prejudice him. This unfair situation manifested itself in the irrelevant and prejudicial questioning by Vann's counsel concerning the search at Avinger's house. This actual prejudice was anticipated and could have been avoided had the court granted the motion to sever.

Moreover, the case against Avinger was based entirely on inferences and circumstantial evidence, while the case against Vann was based on direct evidence of his dealing in cocaine. By allowing a joint trial, the court made it nearly impossible for the jury to consider separately the separate evidence against the two defendants. Avinger must have been prejudiced by the "spillover" effect of

the direct evidence against Vann. Such prejudice was substantial and mandated that a severance occur. United States v. Shuford, supra. Because the failure to sever was prejudicial, the judgment below must be reversed and Avinger must be granted a new trial.

CONCLUSION

For the reasons stated above, the Petitioner, Glen Avinger, respectfully requests that this Court grant this petition and issue a writ of certiorari to the Supreme Court of South Carolina.

Respectfully submitted,

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1988

GLEN AVINGER,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Glen Avinger, Appellant.

Appeal From Charleston County
John Hamilton Smith, Judge

Memorandum Opinion No. 89-MO-158
Submitted January 31, 1989--Filed
May 1, 1989

AFFIRMED

Dale T. Cobb, Jr., of Belk, Howard, Cobb & Chandler, P.A., of Charleston, for appellant.

Attorney General T. Travis Medlock, Assistant Attorneys General Harold M. Coombs, Jr., and William Edgar Salter, III, all of Columbia; and Solicitor Charles C. Condon, of Charleston, for respondent.

PER CURIAM: Affirmed pursuant to Supreme Court Rule 23 and under the following authorities: Exceptions I and II: State v. Kiser, 288 S.C. 441, 343 S.E.2d 292, cert. denied, 479 U.S. 823, 107 S.Ct. 94, 93 L.Ed.2d 46 (1986). Exception III: Dwyer v. Tom Jenkins Realty, Inc., 289 S.C. 118, 344 S.E.2d 886 (Ct. App. 1986). Exception IV: State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984); State v. Allen, 269 S.C. 233, 237 S.E.2d 64 (1977); State v. Rook, 174 S.C. 225, 177 S.E. 143 (1934). Exception V: State v. Howard, Op. No. 22921 (filed Nov. 14, 1988); State v. Matthews, Op. No. 22915 (filed October 24, 1988); State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983); State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981); State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981). Exception VI: State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981).

_____/s/ C.J.

_____/s/ A.J.

DENIAL OF MOTION TO QUASH

THE COURT: All right, sir. In regard to that statute, I have read your brief. The Solom case, of course, deals with someone who wrote a bad check for $100.00 and that was his seventh defense. The court there, as you pointed out when you went over the three criteria--there, of course, the court was shocked, shall we say, by the fact that someone could write a bad check and wind up receiving life imprisonment. They said, of course, you have to look at the crime and is the punishment disproportionate to the crime.

Our trafficking statute dealing with--in this instance dealing with a substantial, relatively substantial, quantity of cocaine does indeed give a severe penalty of 25 years without

parole. The fact that it is a severe penalty, however, does not mean that it is disproportionate to the crime.

That isn't judged solely by what other states may have done, whether other states have been as--have written as strong a statute as we have.

I think in view of the crime involved, trafficking in cocaine, with the amount of crime that is fostered by people's use of cocaine and other narcotics, there is no doubt in my mind that it's 90 percent either cocaine or some other type narcotics or substance which people choose to abuse themselves with constitute 90 percent of the cases that come before this Court. We would have about ten percent of the work if we eliminated all cases in which people were

involved with it. Cocaine is currently the drug that people are seeking. They do it through robbery and larceny and other methods.

I don't think that the sentence is disproportionate to the crime. Other states are dealing with it harshly as well, or severely, I should say. They may not have one that has quite the number of years that we do and perhaps not the parole requirement. I haven't researched, obviously, as you have. That in and of itself doesn't mean that it constitutes cruel and unusual punishment under the Eighth Amendment.

Based upon those findings then, I will deny your motion to quash the indictment based upon the unconstitutionality of the statute.

DENIAL OF MOTION TO SEVER

THE COURT: Let's go back into the matter of the motion to suppress earlier and in regard to the severance issue and the possible confusion that would be raised by the admission of that--I mean by allowing the two defendants to be tried. One of the points raised is that under Bruten that there would be problems.

As I understand it here, the testimony that would be offered is not a codefendant's confession. What is simply going to be offered here is testimony as to hearsay statements during the alleged conspiracy. That does not present a Bruten problem as such. I know it's being argued that some of the same problems; that is, the inability to

cross-examine and some of the same issues are being raised by the defense counsel. Bruten, as I understand it, applies to confessions, where you try to put in a codefendant's confession.

Here there will be testimony as to certain hearsay statements by these defendants in regard allegedly to the pursuit of the conspiracy. There just would simply be no way to ever try a conspiracy case if you apply the rule of excluding any hearsay statements. Our court, the United States Supreme Court, the Fourth Circuit, have all held that you can introduce hearsay statements, and if those are the statements, whether they are made by a codefendant or not.

Bruten just simply doesn't apply to this particular scenario. These aren't

confessions; they are statements given, and our case law is certainly to the effect that in the proof of a conspiracy once a prima facie showing has been made of a conspiracy that the statements can be introduced. So I would have to deny your motion based upon that reason.

DENIAL OF MOTION TO SUPPRESS

THE COURT: The only thing I can tell you is the United States Supreme Court in those two cases: U.S. v. Ross, Michigan versus Thompson, Florida v. Myers in 1984, if you have probable cause to stop a vehicle on the highway, it doesn't vanish when it's impounded, you don't have to go get a warrant. U.S. versus Johns in 1985 is a similar case, "An auto lawfully in police custody may be searched on probable cause without exigent circumstances." That's simply what our court has ruled.

I find that there was probable cause for the arrest. For the facts, I don't need to reiterate all the testimony that's in the record. I have already stated what that was. They had probable

cause to arrest the defendant Avinger. They had probable cause to search his vehicle. Vehicles are mobile; they can be moved. The court has recognized a legitimate exception in regard to automobiles because of their mobility. They had probable cause to search it. Whether the circumstances were exigent or not, they can still search without a warrant either at that time or even later at the police station.

The search being valid--I mean, the arrest being valid, also it would, of course, be justified as an inventory search. He testified the procedure was to go through the vehicle as to valuables, and he testified that's what he did.

So, on either ground, I find that the motion to suppress should be denied.

EXCEPTIONS

I. Did the Trial Judge err in denying Appellant's Motion to Quash the Indictment on the basis that the statute is unconstitutionally vague and broad, in violation of Appellants [sic] right to due process and equal protection.

II. Did the Trial Judge err in denying Appellant's Motion to Quash the Indictment on the basis that the mandatory sentence provided in the statute violates Appellant's constitutional rights against cruel and unusual punishment.

III. Did the Trial Judge err in denying Appellant's Motion to suppress the introduction of evidence seized from his truck on March 4, 1987.

IV. Did the Trial Judge err in denying Appellant's Motion to Sever his case from that of the co-defendant, Jerry Vann, on the basis that there existed antagonistic defenses between the defendants.

V. Did the Trial Judge err in denying Appellant's Motions to Sever or in the alternative to declare a mistrial after repeated questions by co-defendant's counsel raised issues of a search of Appellant's house that the Solicitor had agreed was improper.

VI. Did the Trial Judge err in denying Appellant's Motions for a Directed Verdict of Acquittal on the insufficiency of the evidence.